THE MADRAS LAW JOURNAL

Ramanujam, J.

Muthammal *v.* The Secretary, Kolathur Blacksmithy and Carpentry Workers Industrial Co-operative Society Ltd., Salem.

20th February, 1976.

G.R.P. No. 1246 of 1975.

Tamil Nadu Co-operative Societies Act (LIII of 1961), sections 73 and 25 (1) (b)—Tamil Nadu Co-operative Societies Rules (1963), rule 56—Deficit in stock—Action by Society against President for recovery—Pending proceedings death of President—Action against legal representatives—Limitation—Rule 56 should be followed—Claim held barred by limitation.

From the Audit report for the period from 1st April, 1966 to 31st March, 1969, there was a deficit in the stocks of various articles to the value of about Rs. 5,946·19 by a Co-operative Society. The President was removed from office. The Society filed an arbitration case for recovery under section 73 (1) (c) of the Tamil Nadu Co-operative Societies Act, 1961. Pending this, the President died on 8th November, 1970. Taking note of his death, the arbitrator dismissed the claim of the Society on 12th November, 1970. The Society took an appeal to the Co-operative Tribunal who held that the arbitrator was in error in dismissing the case and said that the proper thing was to permit the Society to bring the legal representatives on record. The Society did not pursue further and the arbitrator dismissed the case for non-prosecution. Subsequently, the Society filed a fresh arbitration claim on 16th August, 1972 against the legal representatives for recovery of the deficit. The legal representatives raised the objection that the claim was barred under rule 56 of the Tamil Nadu Co-operative Societies Rules, 1963. The arbitrator, however, overruled this and passed a decree against the legal representatives by his order, dated 24th April, 1973 against which the legal representatives went on appeal to the Tribunal and failed and have again come by way of revision to the High Court.

Held,

On the facts there could be no doubt that the claim filed against the petitioners on 16th August, 1972 was beyond the period of 3 years provided for in Rule 56. Therefore the arbitration claim having been filed more than three years before that last date, *i.e.*, 31st March, 1969, before which the act or omission could have taken place, it was clearly out of time as per rule 56 (1). The date of the Audit Report could not be material for the purpose of reckoning the period of limitation and it could not have the effect of extending the period of limitation prescribed under rule 56 which has relevance only to the date on which the act or omission took place.

K. Duraiswamy, for Petitioners.

Assistant Government Pleader, for 2nd Respondent.

S.J. *Petitions Allowed.*

Sethuraman, J.

Ramalakshmi Ammal *v.* Seeniya Pillai.

5th March, 1976.

S.A. No. 991 of 1974.

Limitation Act (XXXVI of 1963), Article 61 (b)—Usufructuary Mortgage—Suit for declaration—Transfer of property by mortgagee — Gift of property by mortgagor to her son—Suit whether within time.

One *M* executed a usufructuary mortgage in favour of her sister *S* on 26th

November, 1928 and the time for redemption was 14th August, 1930. If it was not redeemed by that time the mortgagee was to become the absolute owner. The mortgage was not redeemed by 14th August, 1930. The mortgagee sold the property on 18th August, 1933 to one *K* who in turn executed a gift deed in favour of the 7th defendant, his daughter. *M* executed a gift deed in favour of her son, the plaintiff, on 2nd October, 1970. The plaintiff filed a suit after the death of *M*, for a declaration and recovery of possession of the property. The trial Court dismissed the suit holding that the suit was barred by limitation and that *K* had acquired title by adverse possession. On appeal, the learned Subordinate Judge decreed the suit holding that the plaintiff knew about the alienation only in 1970 and the suit was within time. On further appeal by the 7th defendant,

Held,

Article 61 (*b*) of the Limitation Act, 1963 was the appropriate article which applied to the facts of the case. Article 61 (*b*) applied to a case where the mortgagor sued for possession of the property mortgaged which was afterwards transferred by the mortgagee for valuable consideration. The plaintiff had not shown that he or his predecessor-in-title, *M*, knew about the transfer only within a period of twelve years. The suit was, therefore, clearly barred by Article 61 (*b*).

T. Martin, for Appellant.

M/s. Raj & Raj, for Respondent.

S.J. *Appeal allowed.*

Natarajan, J.

State of Tamil Nadu *v.* T. R. M. Subramaniam.

15th March, 1976.

Crl.A. No. 781 of 1974.

Prevention of Food Adulteration Act (XXXVII of 1954), *section* 2 (v)—*Prevention of Food Adulteration Rules, Appendix B, Item A.*05.20—*Turmeric rhizome—Sale of article of food should conform to standard.*

A combined reading and harmonious interpretation of the provisions of the Prevention of Food Adulteration Act and the rules would clearly show that any article which ordinarily enters into or used in the composition or preparation of human food would be an article of food as contemplated under the Act. In such circumstances, turmeric rhizome (Haldi) even if it was in the shape of dried rhizome or bulbous roots of the plant of *Gurguma Longal* would well amount to an article which could be used as an item of food if it was ground into powder form.

Public Prosecutor, for State.

S. Sethuratnam, for Accused.

S.J. *Appeal allowed.*

Suryamurthi, J.

A. Subramaniam Chettiar *v.* Shanmugham.

17th March, 1976.

C.R.P. No. 1285 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a)—*Petition for eviction—Non-residential premises—Owner's occupation—Partnership deed produced by landlords at the trial—Whether* bona fide.

The landlords filed a petition for eviction of the tenants on the ground they required the premises for their own business. At the time of trial, they produced a partnership deed to show that they intended to carry on their business as partners. The eviction was ordered and confirmed by the Appellate Authority. The tenants filed a revision contending that that the filing of the partnership deed changed the frame of the petition.

Held,

If it was found that the landlords *bona fide* required the premises for their own use and for conducting their own business, it was not for the tenant to impugn the right of the landlords to carry on business either as joint family business or as a partnership business. The partnership deed had been produced obviously only as a piece of evidence to prove the *bona fides* of the landlords.

N. S. Raghavan, for Petitioner.

P. K. Sivasubramaniam, for Respondent.

S.J. *Petition dismissed.*

Suryamurthi, J.

K. M. Venugopal Pillai *v.* Muthusamy.

18th March, 1976.

C.R.P. No. 2313 of 1974.

Civil Procedure Code (V of 1908), section 9—District Munsif—Jurisdiction of—Suit for declaration—Defendant contending that the Munsif had no pecuniary jurisdiction—Evidence of defendant—Not sufficient.

The plaintiff laid the suit for a declaration of his right as a cultivating tenant. The rent according to him was 60 *salagais* of paddy. The learned District Munsif held the value of this to be (Rs. 3,300). The defendant contended that the value was more, and gave oral evidence and challenged the pecuniary jurisdiction of the District Munsif. On the question whether this oral evidence would be sufficient,

Held: The defendant had not ventured to produce into Court the notification usually issued in the District Gazette regarding the price of paddy prevailing in that area. The defendant had not made any endeavour to adduce the best evidence that was available to him or could have been available to him if he had made any endeavour to obtain such evidence. In the circumstances the conclusion of the learned District Munsif was perfectly correct.

S. Muthudurai, for Petitioner.

K. Vadivel, for Respondent.

S.J. *Petition dismissed.*

Gokulakrishnan, J.

Sri Pamban Kumara-Gurubara Swami Temple *v.* K. Subramania Mudaliar.

29th March, 1976.

Tr. C.M.P. No. 10533 of 1975.

Civil Procedure Code (V of 1908), section 24—Petition for transfer—Convenience for parties only criteria—*Suit transferred.*

The petitioner filed a petition for transfer of the suit filed by the respondent on the file of the Principal Subordinate Judge, Chingleput for possession of the suit property situated at Tiruvanmiyur, to the City Civil Court, Madras. The petitioner had stated that he was old, that most of the witnesses were residing in Madras and that Tiruvanmiyur was nearer to Madras than Chingleput. The respondent has objected to this.

Held: Section 24 of the Civil Procedure Code was wide enough to confer powers upon the High Court and the District Court for the purpose of transferring a suit. The convenience of the parties concerned was one of the *criteria* for the purpose of transferring the suit. It was clear from the facts of the case that the Court in the City of Madras was nearer to the suit property, than the Chingleput Court. In the circumstances of the case, the suit would stand transferred to the file of the Original Judge, City Civil Court at Madras.

P. Venkatasubami, for Petitioner.

T. V. Ramanujam, for Respondent.

S.J. *Petition allowed.*

Mohan, J.

K. V. Kandasamy Gounder *v.* The Collector and Inspector of Panchayats, Coimbatore.

28th April, 1976.

W.P. No. 1335 of 1976.

Tamil Nadu Panchayats Act (XXXV of 1958), sections 149-A (11), 56—President of Panchayat—Removal of—Meeting called by the respondent—Resolution passed by majority members for removal—Removal of President with retrospective effect from the date of resolution—Validity.

If read in the light of section 56 of Tamil Nadu Act (XXXV of 1958), the only conclusion that is possible is that only a prospective date is contemplated under sub-section 11 of section 149-A of the Act.

P. Chidambaram, for Petitioner.

Government Pleader, for 1st Respondent.

K. V. Sankaran, for 2nd Respondent.

S.J. *Petition allowed.*

Maharajan, J.

Good-Man & Co. *v.* R. S. Thirunavukarasu.

11*th March*, 1976.

G.R.P. No. 623 of 1972 (P).

Limitation Act (*XXXVI of* 1963), *Articles* 14, 68—*Pondicherry—Suit for recovery of possession—Sale of a radio set—Sale price not paid—Suit for recovery instituted after 3 years—Whether Limitation Act applies or local law applies.*

A suit was filed in Pondicherry for the recovery of possession of a radio set from the defendant or, in the alternative, for the recovery of Rs. 450 being the value thereof. The radio set was sold in July, 1965, but the suit was filed only on 23rd February, 1971. The trial Court relying on Articles 14 and 68 of the Limitation Act, 1963 held that the suit was barred by limitation. The plaintiff preferred a revision.

Held: The saving provision of the Limitation Act, 1963 makes it clear that all French enactments relating to Limitation, which were in force in the Union Territory of Pondicherry at the time the Limitation Act, 1963 came into force shall continue to be in force, with this difference, namely that the periods of limitation prescribed in the local law must continue to apply as if such periods were the periods prescribed by the schedule to the Indian Limitation Act, 1963 and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply on condition that those provisions are not expressly excluded by such special or local law as has been in force in the Union Territory of Pondicherry. The last paragraph of Article 2272 of the Code Civil says that actions filed by a merchant for goods sold by them particularly to non-merchants shall be extinguished by the lapse of two years. The suit having been filed on 23rd February, 1971 is clearly barred by the local law of Limitation.

J. Stanislas, for Petitioner.

Government Pleader, for Pondicherry.

K. Parasaran, for Union of India.

S.J. ——— *Petition dismissed.*

Suryamurthy, J.

Govindaraj *v.* Alamelu Ammal.

25*th March*, 1976.

G.R.P. No. 765 of 1975.

Tamil Nadu Indebted Agriculturists (*Temporary*) *Relief Ordinance* (*1 of* 1975), *section* 4—*Debt—Mesne profits not debt within the meaning of the Ordinance.*

Suits and applications of the nature contemplated in section 3 are stayed by reason of the provisions of the Ordinance I of 1975. The suit is for recovery of possession with mesne profits past and future. Mesne profits are not debts within the meaning of the Ordinance because in the proviso to section 3 it is provided "that a suit for possession of land shall not be deemed to be a suit for recovery of a debt by reason merely of mesne profits being also prayed for in such suit."

K. Raman, for Petitioner.

V. Srinivasan, for Respondent.

R.S. ——— *Petition dismissed.*

Suryamurthy, J.

Nataraja Iyer v. Nacharammal.

20th April, 1976.

C.R.P. No. 2532 of 1974.

Civil Procedure Code (V of 1908), Order 5, rule 9 (1) and (2)—Scope of—Words and Phrases—"May".

As per Order 5, rule 9 (1) and (2), as it stands now, the service of summons by post on a party does not appear to be sufficient to confirm an order passed *ex parte*, if the concerned party challenges the service of summons by post and denies having received the same. It would appear from Order 5, rule 9 (1) and (2), Civil Procedure Code, that even though the summons is served by post, if the defendant does not appear on the day fixed on the summons, the Court has to direct that the summons shall be delivered or sent to the proper officer to be served by him or one of his subordinates on the defendant. In the context in which the word "may" is used it has to be interpreted as shall. The word "may" includes "may not" but is capable of meaning 'must' or 'shall' depending upon the context in which it is used. Where a discretion is conferred upon the Court coupled with an obligation, the word "may" denotes "shall". It is the duty of the Courts in construing a statute to give effect to the intention of the legislation. The word "may" has been used by the legislation in some cases as a matter of pure conventional courtesy though the word is intended to be mandatory in force. In order to interpret the legal import of the word may the context in which the word is used and the background against which the word has been used and the purpose and the advantage sought to be achieved have to be considered. If the service of summons by post itself, when acknowledgment is duly received, is to be deemed sufficient service, the provisions for the Court directing that the summons should be delivered or sent to the proper officer to be served by him or one of the subordinates on the defendant, if the defendant do not appear even after the summons is served, is wholly unnecessary and would not have been incorporated in Order 5, rule 9 (2), Civil Procedure Code. Obviously because the Court has no control over the postman and there is every possibility of the summons or notice being served on a wrong person with the same name, service of summons through Court again, if the defendant does not appear after the purported service of summons by post, was deemed necessary and laid down in the necessary rule. When the defendant does not dispute having received the summons by post, no problem would arise. But where such dispute arises, service of summons by post cannot be held to be sufficient to sustain an *ex parte* decree or *ex parte* order.

Masilamani, for Petitioner.

Venkataraman, for Respondent.

R.S.

Revision dismissed.

Ramaprasada Rao, J.

R. V. Balasubramania Chettiar v. J. B. M. Mohamed Yahaya.

28th April, 1976.

C.R.P. Nos 2979 to 2982 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (a) (iii)—Building—Co-owner requiring building for personal occupation — Petition for eviction maintainable.

"Family" means, according to the Oxford Dictionary, members of a household, parents, children, servants, etc. "Family" also means people from common stock or brotherhood of persons united by some common objects. If therefore two or more persons united by a contract or otherwise to own property by themselves, then they would be forming themselves into an association of persons inspired by the common object of owning the property for the common benefit of all. The principal object of section 10 (3) (*a*) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, appears to be that if 'A' owns a building, then 'A' can ask for possession of that building from the

tenant. if it is intended to benefit any member of his family. This purpose has to be high-lighted when applying the principal object which has to be interpreted. A member of an association or a co-owner in a body of co-owners who owns a premises could be equated to the word 'landlord' which precedes the parenthesis "any member of his family" and the words 'any member of his family' in the context as it appears in the text of the statute could also mean any co-owner or the co-owners or a member of the association which owns the premises in question. The *sine qua non* which would entitle the body of co-owners or the association of persons to ask for eviction under section 10 (3) (*a*) (*iii*) is that the premises is required for the benefit of one of its limbs *viz*., a co-owner or a member of the association. If this is established, it would enable the association of persons or the co-owners as a whole to set the above provisions of law into motion and seek for eviction.

S. Sivasubramanian and *D. Raju*, for Petitioner.

T. R. Rajagopalan and *T. R. Raja Raman*, for Respondent.

R.S. —— *Petitions dismissed*.

Ramanujam, J.

Abdul Kareem by Power of Attorney v. D.R.O., Madras.

29*th April*, 1976. W.P. No. 3851 of 1974.

Rice Milling Industries Regulation Act (XXI of 1958)—*Application for licence by non-resident of India —Licence cannot be granted.*

Citizenship Act (LVII of 1955), *section* 9 *and rule* 30—*Determination of citizenship —Competent authority.*

The petitioner applied for a rice mill licence to run a rice mill and the same was issued to him by the District Supply Officer. The second respondent, an existing rice mill owner of that locality, filed an appeal against the order contending that there was no sufficient quantity of paddy in the locality, that the licencee was not a resident of India, that he was a citizen of Malaysia, and that therefore he was not entitled to obtain any licence under the Act.

Held : A non-resident can also exercise all lawful avocations or professions anywhere in India provided there is no statutory prohibition in that regard. However in the matter of grant of licence for running a rice mill or for the establishment of any industry for that matter the licensing authority has to see whether if the licence is given, the person to whom it is granted can be subjected to the licensing regulations. If a foreigner applies for a licence then he must be resident in India so that the regulation or conditions subject to which the licence is given could be enforced as against him. Though a non-citizen can claim to exercise any lawful avocation in India, if he is not resident in India he may be denied the licence for carrying on such an avocation as the regulations connected with that avocation cannot be enforced against him.

The final decision as to whether the petitioner has voluntarily acquired the citizenship of another country or not has to be made only by the Central Government. However, while exercising the functions under the Rice Milling Industries Act, an incidental finding has to be given on the question as to whether the petitioner is a citizen of India when such question is raised in the proceedings.

Kumar Rajarathinam, for Petitioner.

M. Raghavan, for II Respondent.

The Assistant Government Pleader, for First Respondent.

R.S. —— *Petition dismissed.*

Ramaprasada Rao, J.

Syed Peershah v. Tamil Nadu Wakf Board by its Secretary.

23rd *April*, 1976.

C.R.P. No. 730 of 1975.

Wakf Act (XXIV of 1954)—Scheme framed by civil Court prior to the passing of the Act—Modification of the scheme competent only by civil Court—Wakf Board not competent.

When a scheme has been framed by a civil Court prior to the passing of the Wakf Act, then it shall prevail and shall be taken as the basis by the Wakf Board for administering the particular wakf for which that scheme has been framed. It is open to the Wakf Board to apply to the civil Court for modifying the scheme if an occasion or necessity arises. But it cannot on its own volition or through the intervention of Courts substitute itself in the place of the civil Court and take upon itself the authorship of that scheme. Once the scheme has been framed prior to the Act, it is only the civil Court which can modify it and it can do so when it is called upon by the Wakf Board.

T. R. Rajagopalan, for Petitioner.

M. A. Sattar Sayeed, for Respondent.

R.S. ——— *Ordered accordingly.*

Mohan, J.

Kanunga Industries, Bangalore v. The Chief Controller of Imports and Exports, New Delhi.

22nd *June*, 1976.

W.P. No. 5 of 1976.

Imports (Control) Order (1955), Clause 10 (2)—Deputy Chief Controller of Imports and Exports acting as appellate authority—Papers submitted to Chief Controller of Imports and Exports—Orders passed—Order incorported in the order passed by Deputy Chief Controller of Imports and Exports—Order vitiated.

In the instant case, the petitioner's appeal to the Chief Controller of Imports and Exports was heard by the Deputy Chief Controller who ultimately submitted the papers to the Chief Controller who passed an order. This order was incorporated in the impugned order of the Deputy Chief Controller. The petitioner challenged the jurisdiction of the Deputy Chief Controller.

Held: In view of the definition in clause 2 (*aaa*) of the Imports (Control) Order, 1955, the Deputy Chief Controller of Imports and Exports was also an appellate authority and he was working in the office of the Chief Controller of Imports and Exports. In the instant case, a curious thing happened in that the Deputy Chief Controller having heard the matter instead of himself applying his mind and passing the order, what he actually did under the impugned order was that he proceeded with the matter as the appellate authority in the first four paragraphs and held that the argument of the petitioner would not be accepted, but in paragraph 5, he incorporated the Chief Controller's orders and because of this the order had to be held to be vitiated.

K. K. Venugopal, for Petitioner.

S.J. ——— *Petition allowed.*

Ramanujam, J.

S. Ganesan, Proprietor, Ganeshram Touring Talkies, Seithur Post, Ramanathapuram District v. The Commissioner of Land Revenue and Transport, Madras.

23rd *June*, 1976.

W.P. No. 4199 of 1974.

Tamil Nadu Cinemas Regulation Rules (1957), rule 14 (2)—Grant of no objection Certificate—Application for grant of 'C' Form licence—Objection by third respondent that the proposed Cinema was within prohibited distance—Objection not to be considered at that stage—Objections to be raised at time of issue of no objection Certificate.

All objections relating to the site including the objection based on prohibited

distance should be raised and decided at the stage of the grant of no objection certificate, and those objections which relate only to the site cannot be postponed or relegated to the stage of issue of 'C' Form licence. The question of 'C' Form licence arises at a stage when the applicant would have constructed the touring Cinema on the site based on the no objection certificate. If all objections relating to the site which were gone into earlier at the stage of the issue of no objection certificate were to be considered over again by the Collector at the stage of issue of 'C' Form licence, it will defeat the very object and purpose of the issue of no objection certificate.

K. Alagiriswami and *R. Subbaraj*, for Petitioner.

S.J. ——— *Petition allowed.*

Suryamurthy, J.

Rayana Goundar v. Muthuswamy Goundar.

24th June, 1976.

C.R.P. No. 565 of 1975.

Civil Procedure Code (V of 1908), Order 6, rule 17—Suit for declaration—Use of cart track—Petition to amend plaint—Allegation of defendant violating interim injunction and erecting fence—Amendment of prayer, claiming relief of mandatory injunction—Amendment refused by Trial Court—Liberal view to be taken by Court in matters of amendment of plaint—Time of filing petition not the criterion—Amendment granted.

The suit was originally for a declaration that the plaintiff was entitled to use a cart-track. An interim injunction had been granted preventing the defendant from interfering with the use and enjoyment of the said cart-track. The plaintiff filed a petition later on to amend the plaint alleging that the defendant had violated the interim injunction by erecting a fence so as to narrow down the cart-track and since the plaintiff was prevented from going to the cart-track, he was unaware of the tamperings of the defendant and the plaint had therefore to be amended and the relief of mandatory injunction granted to him. This prayer and allegation did not alter the frame of the suit. The trial Court refused the amendment. On revision,

Held: A liberal view should be taken in such matters and the interests of justice should be the foremost criterion in considering the question whether an amendment of the pleadings should be allowed. The prayer by way of mandatory injunction had been necessitated by what the plaintiff alleged as acts of misfeasance or malfeasance by the defendant. Hence, the lower Court ought to have allowed the amendment. The stage at which the petition for amendment was filed ought not to have been the criterion for granting or refusing the relief sought for by the party.

K. Sarvabhauman, for Petitioner.

S.J. ——— *Petition allowed.*

Ramanujam, J.

P. Ramaswamy v. The Asst. Engineer, Highways and Rural Works Dept., Nagapattinam.

24th June, 1976.

W.P. No. 527 of 1975.

*Tamil Nadu Land Encroachment Act (III of 1905), sections 6, 7—Eviction proceedings taken by Respondent—Notice under section 7 not issued—Proceedings held vitiated—*Certiorari *issued—Constitution of India* (1950), *Article* 226.

The petitioner had put up a saw mill and other superstructures in a certain area, claiming to be the owner of the property on which they were put up. The respondent visited the premises with his men and demolished the compound wall. The petitioner approached the District Collector to prevent this. Subsequently, the petitioner was served with a memo stating that the petitioner had encroached on the road and was directed to remove the encroachment within 24 hours. The petitioner filed

a petition to quash the memo. of the respondent apprehending further action by him. The petitioner contended that the respondent was not an officer for initiating proceedings under the Land Encroachment Act and that there was no proper notice informing the petitioner of any encroachment.

Held: There was no indication from the file as to whether the notices under section 6 of the Act (stated to have been despatched) had been served on the petitioner or whether notice under section 7 had been issued prior to the issue of section 6 notice. In this case, there being no notice under section 7 served on the petitioner, the initiation of notice for summary eviction under section 6 could not be a proper compliance with the provisions of the said statute. Therefore the impugned memorandum issued by the respondent stood vitiated.

R. G. Rajan, for Petitioner.

S.J. —— *Petition allowed*.

Mohan, J.

T. S. Meenakshisundaram v. Collector of Customs, Madras.

25*th June*, 1976.

W.P. No. 2251 of 1974.

Central Services—Customs Department—Temporary appointment as Preventive Officer in Grade 1—Confirmation later—Respondents 2 to 31 who joined subsequently confirmed earlier—Promotion of a number of respondents to Senior Grade—Petitioner claiming fixation of seniority over respondents so promoted and challenging delay in his confirmation—Benefit of Establishment Standing Order No. 121 *of* 1971 *claimed—Petitioner held governed by Memorandum dated* 22*nd December,* 1959 *and not entitled to confirmation earlier.*

The petitioner who entered the Customs Department, as preventive officer Grade II was appointed as preventive officer, Grade I on 16th July, 1963 and assumed charge on 22nd July, 1963. Respondents 2 to 31 joined subsequently in Grade I, but they were confirmed earlier while the petitioner was confirmed by order dated 31st December, 1973 to be effective from 20th September, 1973. A number of respondents were promoted to the Senior Grade and the petitioner challenged the same and contended that his seniority should have been fixed above the respondents and having regard to Establishment Standing Order 121 of of 1971 dated 26th October, 1971 the circular O.M. No. 9/11/55/RPS dated 22nd December, 1959 would apply only after 2nd September, 1971 and therefore, his seniority should have been fixed from the date of his initial appointment.

Held: For the purpose of fixation of seniority, it was the date of confirmation which was to be reckoned with. This was a case to which the proviso to paragraph 4 of the Annexure to the Memorandum dated 22nd December, 1959 clearly applied. Consequently, it was not open to the petitioner to contend that the other respondents though initially appointed later should not be placed above the petitioner since all the respondents came to be confirmed far earlier in 1968 itself than the Writ Petitioner.

N. R. Chandran, for Petitioner.

K. Alagiriswami, for Respondent 1.

S.J. —— *Petition dismissed*.

Natarajan, J.

State of Tamil Nadu v. Kalyanasundaram.

25*th June*, 1976.

Crl. A. No. 362 of 1974.

Tamil Nadu Chit Funds Act (*XXIV of* 1961), *sections* 2 (12), 20 (2), 56 (2) (*b*)—*Chit Fund—Subscriber defaulting in payment of the very first instalment—Removal from rolls—Intimation of removal not sent to subscriber within* 14 *days—Respondent not liable for penal action—Defaulting subscriber cannot be a non-prized subscriber.*

The respondent was conducting a Chit Fund business in which one *R* consented to become a subscriber for a chit. However *R* defaulted in paying the very first instalment and the respondent removed *R* from the rolls of the chit.

But the respondent did not intimate the removal to *R* within 14 days of the removal and the Chit Registrar preferred a complaint against the respondent. The Trial Magistrate accepted the defence of the respondent that *R* having defaulted in the payment of the very first instalment was not a non-prized subscriber under the Chit Fund Act and the respondent was not under obligation to give notice of his removal. The State filed an appeal.

Held: A subscriber committing default *ab initio* could not be equated with a non-prized subscriber, whose removal alone from the subscription list calls for intimation under section 20 (1) and 20 (2) of the Chit Funds Act. For a subscriber to be included in the category of non-prized subscribers, he should have contributed atleast the first instalment of the chit and be eligible to bid at the auction. Without the payment of even one instalment, a subscriber could not be termed a non-prized subscriber as envisaged in section 2 (12) of the Act. In such circumstances, the acquittal of the respondent had to be sustained.

B. Ramamoorthy, for Public Prosecutor.

T. R. Rajagopalan, for Respondent.

S. J. — *Appeal dismissed.*

Varadarajan, J.

Pushpavalli Ammal *v.* Rasu.

28th June, 1976.

C.R.P. No. 3526 of 1974.

Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (*X of* 1969), *section* 16-A—*Suit for declaration as cultivating tenant—Matter already decided in proceedings under the Act—Civil Court has no jurisdiction to decide issue.*

The plaintiff filed a suit for a declaration that he was a cultivating tenant. The defendants contended that the matter had been decided in the proceedin under the Act to which the plaintiff was a party that the defendants were the cultivating tenants in respect of the very sa re property and therefore the civil Court had no jurisdiction to go into the question once again. However, the learned District Munsif negatived the contention of the defendants. In revision,

Held: The Record Officer had determined, in the presence of the first respondent (plaintiff) that the defendants were the tenants in respect of the property. As per the Bench decision (in *Muniyandi* v. *Rajangam Iyer*, (A.A.O. No. 213 of 1975) of this Court, the Civil Court had no jurisdiction to go into that question.

U. Somasundaram and *P. Kothandaraman*, for Petitioner.

S.J. — *Petition allowed.*

Ramanujam, J.

K. Vasudevan v. Punjab National Bank.

30*th June*, 1976.

W.P. No. 7627 of 1975.

Nationalised Bank—Settlement between Bank and Employees Federation—Recruitment to the post of Accountant from Clerical Cadre—Percentage fixed—Number of vacancies for the year announced—Recruitment made from Clerical Cadre after holding tests—Vacancies exceeded at the end of the year—Fresh test conducted for appointment—Petitioner who passed in the first test but not promoted failing in the second test—Claim that selection should have been made on the basis of the first test—Claim not tenable—Writ of certiorari *and* mandamus *refused—Constitution of India* (1950), *Article* 226.

As per the terms of settlement arrived at between the respondent Bank and its Employees Federation, the recruitment to the posts of Accountants was to be made in a specified manner. Clause (1) of the settlement provided a percentage from the clerical cadre to be promoted by holding a written test. For the year 1975, the respondent originally estimated the vacancies at 298, and conducted the required test and interview in May, 1975. According to the quota allotted, the clerical cadre was entitled to 104 posts, whereas 174 clerks had passed the required test. The respondent offered the first 104 the appointment. Only 96 persons accepted. Therefore, the respondent offered appointment to the first 8 out of the remaining qualified clerks.

Subsequently, the respondent found that the earlier estimate of vacancies was not correct and there were further vacancies. To fill up these another test was conducted in December, 1975, following the procedure in clause (1) of the settlement. The petitioner appeared in this test, but failed. He was one of those who had appeared in the earlier test and qualified but was lower in the list of 174 and was not offered appointment. The petitioner challenged the holding of the second test and sought a *mandamus* that in his case appointment should be made on the basis of the earlier test.

Held, Clause (1) of the settlement could not be taken as mandatory preventing the management from making a further recruitment of accountants in the same year if its earlier estimate was found to have fallen short of the actual anticipated vacancies. The list of clerical grade prepared in May, 1975 in the orer of merit had served its purpose and therefore, when the second recruitment was made in December, 1975 the petitioner could not claim that the earlier list still existed and that recruitment should be made from that list.

Aiyar and *Dolia* and *A. L. Somayaji*, for Petitioner.

M. R. Narayanaswamy, for Respondent.

S.J. ——— *Petition dismissed.*

Koshal, J.

Kurshid Ahmed Khan v. The Union of India represented by Genreral Manager, S. Railway, Madras.

14*th July*, 1976.

W.P. No. 2648 of 1973.

Constitution of India (1950), *Article* 226—*Writ of* mandamus—*Petitioner retiring from Government Service submitting a letter of resignation—Provident Fund due to the petitioner—Amount not settled by respondent—Amount kept pending determination of losses recoverable from petitioner*—Mandamus *seeking direction for payment—Writ issued.*

The petitioner retired from railway service as Assistant Inspector of Works on 1st June, 1964 by submitting a letter of resignation. He sought the issue of a writ of *mandamus* directing the Union of India to make payment to him of the entire provident fund amount including interest standing to his credit without deducting therefrom any sum which the respondent might be claiming as due from him on account of losses caused to them or otherwise. Though the petitioner had already written a letter to the railways accepting to bear any

losses the quantum of such losses was never determined by consent of parties or by any award of Court.

Held, the respondents could not in law make any deductions on account of such losses from the provident fund to be paid to the petitioner. The respondents were directed to pay to the petitioner forthwith the entire amount due to him on account of the provident fund including interest upto date. However, it was made clear that the respondents' right to have the liability of the petitioner for any losses determined by a Court remained unaffected by this order.

V. Srinivasan and *M. S. Chandrasekaran,* for Petitioner.

S.J. ——— *Petition allowed.*

Koshal, J.

S. Paul Christian v. The Director-General, Central Reserve Police, R. K. Puram, New Delhi-22

14th July, 1976. W.P. Nos. 2644 and 2645 of 1973.

Constitution of India (1950), *Article* 226—*Writ of* certiorari—*Petitioner temporarily appointed as compounder—Later found not qualified for the post but eligible for appointment only as nursing orderly—Petitioner given option to serve as nursing orderly—Refusal by petitioner—Service terminated—Termination valid—Writ of* mandamus—*Issue of—Fixation of pay scale as compounder—Writ issued.*

On 13th June, 1969, the petitioner was appointed as compounder in the Central Reserve Police in the pay scale of Rs. 130—240 plus usual allowances. Later on, it was discovered that the appointment was irregular for the reason that the petitioner was not registered under the Pharmacy Act and was eligible for appointment only to the post of nursing orderly, in the scale of Rs. 80—110. The appointing authority by his letter, dated 7th December, 1971 asked the petitioner whether he was willing to serve as a nursing orderly. As the petitioner refused the appointing authority by his letter, dated 31st May, 1972, terminated the services of the petitioner. The petitioner filed two petitions under Article 226 of the Constitution, one to quash the termination and the other to direct the fixation of his salary in the pay scale mentioned in the letter of appointment dated 13th June, 1969 as against the lower scale granted by the appointing authority, in the lower scale of nursing orderly.

Held, (1) the appointing authority was fully justified in adopting the lack of minimum qualifications in the petitioner as an administrative ground in support of the notice of termination of the petitioner's services. The notice was thus fully governed by the conditions of appointment and could not be successfully attacked.

(2) Just because, the petitioner's appointment was found to be defective, the appointing authority did not gain any right to scale down the salary of the petitioner and to bring it in conformity with a lower pay scale. The respondents were directed to fix the salary of the petitioner in the pay scale assured to him in the letter of appointment for the entire period of his service.

S. Nainar Sundaram, for Petitioner.

Petition No. 2644 *of* 1973 *dismissed.*

S.J. ——— *Petition No.* 2645 *of* 1973 *allowed.*

Suryamurthy, J.

Shamshed Begum v. D. P. Doraiswami.

14th July, 1976. C.R.P. Nos. 1615 and 1177 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (*XVIII of* 1960), *section* 14 (1)(b)—*Petition for eviction—Demolition and reconstruction—Undertaking under section* 14 (1) (b) *not filed—Petition cannot be dismissed as not* bona fide—*Entire evidence must be considered and decision taken.*

The landlord filed a petition for eviction on the ground that he required the building for demolition and reconstruction. This was accepted by the Rent Controller

but the appellate authority did not agree with this view on the ground that the landlord had not filed an undertaking as required under section 14 (1) (*l*) of Act (XVIII of 1960). On revision filed by the landlord,

Held, what was required was that the landlord should be in a position to demolish and reconstruct the building, that he should have the necessary resources to do so and that he should give an undertaking as required by the provisions of the Act. Merely because an undertaking was not given the petitions need not have been dismissed. The landlord might have been called upon to give such an undertaking. In the circumstances, it was necessary that the appellate authority should reassess the entire evidence and consider the question of the necessity for demolition and reconstruction from a proper perspective. The matter was remanded to the appellate authority for fresh disposal after getting an undertaking from the landlord in accordance with the provisions of the Act.

K. Alagiriswami and *R. Subbaraj*, for Petitioner.

S.J. *Petitions allowed.*

Ramaprasada Rao, J.

Sundara Gopal v. Subramanian.

2nd July, 1976.

C.R.P. No. 1590 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10—Landlord having two buildings—Petition for eviction in respect of one building in occupation of tenant—Other building vacant—Landlord whether entitled to ask for eviction of the tenant in occupation of the other building.

The Madras Buildings (Lease and Rent Control) Act states that if the landlord is in occupation of a building of his own, then the bar to apply for eviction of a tenant in another building of his own would come for adjudication. A building may be kept vacant for various reasons. It may be for the reason that it is unfit for occupation. It may be for sentimental reasons and for other causes. It is now well established in our Court at any rate that it is not for the tenant to dictate as to which of the houses of the landlord should be asked for his own use and occupation. Unless it is established that the landlord is physically in possession of a building of his own, it would be idle to contend that he is in occupation of a vacant building. It may be that the landlord might attempt to circumvent the law as in the case reported in A.I.R. 1950 Mad. 556 by putting his relative in a building and seeking for eviction of the tenant in another building. It was there held that it is not open to a landlord at any time if he so desires to go to reside in it. This poses a very different state of things. But to the case of a vacant building this principle cannot be extended as it would be illogical to do so.

V. S. Subramaniam, for Petitioner.

O. V. Baluswamy, for Respondent.

R.S. *Petition dismissed.*

Gokulakrishnan, J.

Velayutha Nadar v. Karuppayee Ammal.

9th July, 1976. C.R.P. No. 336 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (c)—Petition for eviction—Government order, dated 12th August, 1974—G.O. exempting certain buildings—Pending proceedings—Whether affected.

The construction of a Government Order as to whether it affects a pending proceeding or not, cannot be considered as a supervening circumstance which would enable a party to take advantage of the Government order, which has no retrospective effect.

It is clear from the decisions in *Papatlal Gokulchand* v. *Ramachandar Narayanrao*, A.I.R. 1949 Nag. 3 and *V. Sattaiah* v. *Custodian, Evacuee Property, Government of Andhra Pradesh*, A.I.R. 1961 A.P. 477 that the Government Order Ms. 1998 Home, dated 12th August, 1974 will not affect the Rent Control Proceeding started much earlier than the coming into force of the said Government Order.

Raja, for Petitioner.

K. N. Balasubramanian, for Respondent.

R.S. *Petition allowed.*

Gokulakrishnan, J.

Manickam Chettiar v. Pasumponnal Achi.

9th July, 1976. C.R.P. No. 1036 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14 (1) (b)—Petition for eviction—Ground of demolition and reconstruction—Eviction ordered—Subsequent sale of building by landlord—Purchaser getting possession and demolishing—Benefit of order enures to purchasers also.

Subsequent purchasers can have the benefit of an order obtained by their vendors for demolition and reconstruction of a building. Subsequent happenings can be considered in order to decide the dispute in question, and for doing substantial justice to the parties. No doubt in the instant case the house had been sold. But it was evident that the purchasers had demolished the building in question and one of them had filed an affidavit stating that they wanted to reconstruct a new building, therein. In similar circumstances in C.R.P. No. 2703 of 1973 after obtaining an affidavit from the subsequent purchaser it was held that the order of eviction on the ground of demolition and reconstruction will enure to the benefit of the subsequent purchaser also. *Shanmugham* v. *S. Satyanarayana Prasad*, I.L.R. (1964) 2 Mad. 354, relied on.

N. Sivamani, for Petitioner.

T. R. Mani, for Respondent.

R.S. *Petition dismissed.*

Gokulakrishnan, J.

Muthuswami Gounder v. A. P. Kaithamalai Gounder.

9th *March*, 1976. C.R.P. No. 2664 of 1975 and C.M.P. No. 13787 of 1973.

Partition Act (IV of 1893)—Inherent power of Court to direct sale outside provisions of Act.

Civil Procedure Code (V of 1908), section 151—Partition suit—Court has no inherent power in partition suit to direct a sale outside the Partition Act.

In a partition suit the lower Court directed the Commissioner to sell the property among the sharers after giving one month's notice to the counsels of both the parties and that the successful bidder among the sharers shall be permitted to set off his share of the sale price and deposit the balance. On revision,

Held : It is clear from the order passed by the lower Court, which was under Order 26, rules 13 and 14, Civil Procedure Code and section 151, Civil Procedure Code that auction was directed to be held among the sharers. Such a direction is outside the purview of the Partition Act. The discussion and the decision rendered in O.S.A. No. 108 of 1966 shows that the Court does not have inherent powers, apart from the Partition Act, to pass orders in respect of a partition suit. The Court below should not have ordered auction of the suit property as between the sharers. In the circumstances, the order of the Court below is set aside and the matter is remanded to the file of the lower Court for the purpose of disposal afresh in accordance with law.

S. Gopalaratnam, for Petitioner.

M.R. Narayanaswamy, for A. *K. Kumaraswamy*, for Respondent.

R.S. *Revision remanded.*

[FULL BENCH]

Kailasam, CJ.,
Ramanujam and
Balasubramanian, JJ.

Chief Controlling Revenue Authority, Board of Revenue *v.* Subramanian

26th April, 1976. R.C. No. 2 of 1972.

Indian Stamp Act (II of 1899), *sections* 2 (17), 6, *Sch. I, Articles* 34 *and* 40 (b)—*Document of sale — Particular property offered as indemnity—Subsequent release by vendees of their rights in the property offered as indemnity accepting in lieu another property—Document presented for registration—Objection by Sub-Registrar regarding the stamp duty—Document whether a mortgage—Duty payable.*

The respondents had executed a sale deed on 18th November, 1967 in respect of a particular property. Under the sale deed another property had been offered by the vendors and accepted by the vendee as indemnity against loss, damage or claim in regard to the property sold. The vendors subsequently approached the vendees to release their rights over the property offered as indemnity and instead to accept another property. The vendee agreed and released their rights over the property originally offered as indemnity under the sale deed. A document was executed purporting to be an indemnity bond in favour of the vendee and presented for registration. The Sub-Registrar raised a doubt regarding the stamp duty payable and referred the matter to the District Registrar who took the view that the document in question was both a mortgage deed and an indemnity bond attracting levy of stamp duty under Arts. 34 and 40 (*b*) of Schedule I to the Act and chargeable under section 6 of the Act. This view was confirmed by the Board of Revenue.

Held : The only question for consideration is whether the document falls within the definition of "Mortgage deed" in section 2 (17) so as to attract the higher duties. The document in question is not executed for the purpose of securing money advanced or to be advanced by way of loan, or an existing or future debt. It does not secure the performance of any engagement but it is merely a contrace by which the vendors promise to save tht vendee from any loss or damage that may be caused to him by the conduct of the vendors themselves or of any other person. It is clearly a contract of indemnity falling under section 124 of the Indian Contract Act. A contract of indemnity contained in an instrument which is implied by law or is ancillary to the main purpose is not separately chargeable with duty as an indemnity bond. It is for this reason a covenant relating to a warranty of title included in a conveyance is not chargeable separately as an indemnity bond. Therefore in this case where the vendors have not engaged themselves to perform any positive act or service to the vendee, the rights created under the instrument by way of indemnity for any loss or damage which the vendee may suffer cannot be said to come under the definition of "mortgage" liable to stamp duty as such.

The Additional Government Pleader *Manivannan*, for Petitioner.

A. R. Ramachandran (*amicus curiae*), for Respondent.

R.S. *Reference answered accordingly.*

Ramanujam and
V. Ramaswamy, JJ.

Durairaj *v.* Rajan.

12th July, 1976. A.S. No. 696 of 1968.

Contract Act (IX of 1872), *sections* 23 *and* 65—*Partnership business for running touring cinema—License in the name of one person only—Partnership business illegal—One partner retiring from business—Other partners execute promissory note in his favour for the amount due to him—Suit on the promissory note—Retiring partner is entitled to the amount.*

Madras Cinemas (Regulation) Act (IX of 1955).

Under section 23 of the Indian Contract Act, an agreement is lawful unless it is forbidden by law or the Court regards it as opposed to public policy. When an unlawful agreement is brought before the Court it would be necessary to find out the exact scope of the statutory

prohibition. It is a matter of construction of a particular statute in each case. Except in cases where the law forbids it with a view to the protection of the public, normally the Court may enforce the contract.

It was not clear in the instant case as to when the partnership was entered into. The parties however seem to have been ignorant of the legal position from the commencement of the partnership. The parties entered into the business under the licence issued in the name of one partner completely unaware of the legal position that the partnership itself might be considered to be hit by section 23 of the Contract Act. It was only subsequently that they must have learnt about the illegality. Both in the promissory note and in the written statement it was stated that the promissory note was executed in respect of the share capital of the plaintiff. It was also admitted in the written statement that even after the plaintiff came out of the partnership the business was carried on by the three defendants. Since the promissory note amount represented the amount paid by the plaintiff to the defendants, the defendants are bound to return the money under section 65 of the Contract Act.

N. Vanchinathan, for Appellant.

T. R. Srinivasan and *K. Ramamurti*, for Respondent.

R.S. —— *Appeal dismissed.*

Mohan, J.

S. Meganathan v. Deputy Registrar of Co-operative Socities, Tiruchendur.

20th July, 1976.

W.P.No. 2265 of 1976.

Tamil Nadu Co-operative Societies Act (LIII of 1961), *section* 119-*A—Co-operative Bank —Appointment of Secretary—Confirmation—Appointment contrary to Depar mental instructions—Directions by Deputy Registrar to terminated services—Services terminated—Validity—Termination upheld*—Certiorari *refused—Constitution of India* (1950), *Article* 226.

The petitioner was appointed as Secretary of the Trichendur Co-operative Land Development Bank on probation on 17th March, 1975 and was confirmed on 20th March, 1976. On 19th April, 1976 the Deputy Registrar of Co-operative Societies directed the Bank to terminate the services of the petitioner since his appointment was contrary to Departmental instructions. As a result, by the impugned order dated 4th May, 1976 the peitioner was given notice about the proposed termination. The petitioner, challenged the order on the ground of equitable estoppel, since there was no misrepresentation by the petitioner and also claimed that before the termination he should have been put on notice.

Held, the instructions contained in the circular of the Registrar of Co-operative Societies R.C. No. 6333/73/K.2. dated 24th April, 1973 and the circular R.C. No. 49187/73/K-2 dated 22nd August, 1974would clearly fall under section 19-A of the Tamil Nadu Co-operative Societies Act. It was the definite case of the Bank that these instructions were not followed before the petitioner was appointed as paid Secretary. Therefore, the initial appointment itself carried with it an irregularity. In a case of this character, there could be no equitable estoppel, nor again could there be any violation of the principles of natural justice. No prejudice had been caused to the petitioner by the non-issue of the notice, because there was nothing which he could have urged to say that the Bank did follow the instructions issued by the Department. The writ petition would stand dismissed.

R. Nadanasabapathy, for Petitioner.

T. Martin, for 2nd Respondent.

S.J. —— *Petition dismissed.*